

No. 78-785

Supreme Court, U. S.
FILED
JAN 2 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH JESSE ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-785

JOSEPH JESSE ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner contends that the court of appeals should have issued a writ of mandamus ordering the district court to transfer petitioner's trial.

1. On August 2, 1978, petitioner and J.E. Enterprises, Inc., a California corporation, were indicted in the District Court for the Southern District of West Virginia for conspiracy to transport, and transportation of, obscene materials from California to West Virginia, in violation of 18 U.S.C. 2, 371, and 1465. Petitioner moved under Rule 21(b), Fed. R. Crim. P., to transfer the case from the Southern District of West Virginia to the Central District of California. The district court denied the motion on September 21, 1978 (Pet. App. 1-17).

Petitioner then filed in the United States Court of Appeals for the Fourth Circuit a petition for a writ of mandamus to compel the district court to transfer the case

to California. The court of appeals denied the petition on October 13, 1978 (Pet. App. No. 2). Petitioner applied for a stay of the trial, scheduled to begin on October 16, from this Court. On October 13, this Court denied his application for a stay. *Espinoza v. United States*, No. A-338. Following the trial in the Southern District of West Virginia, the jury found petitioner and the corporate co-defendant guilty on both counts of the indictment. Petitioner has moved the district court for a new trial and, accordingly, has not yet been sentenced.

2. Petitioner's contention that the court of appeals erred in denying a writ of mandamus to compel transfer of this case is moot. Petitioner has been tried and it is thus no longer possible to change the venue of his trial. If petitioner's motion for a new trial is denied, he can raise the issue of venue on appeal of his conviction. If his motion for a new trial is granted, petitioner can again move for a transfer of the case.¹ If that motion is again denied, he may raise the issue on appeal in the event of conviction. In either event the question does not now merit the attention of this Court.²

¹Petitioner says that if a retrial is granted, it is "not clear" whether a second transfer motion could be filed (Pet. 9 n.3). We know of no reason why a second transfer motion could not be filed in the district court. Petitioner must challenge any district court ruling initially in the court of appeals. Hence, petitioner's request that this Court defer its decision is without merit.

²Because petitioner, if his conviction stands, will have an opportunity on appeal to challenge the district court's ruling on his transfer motion, the issue will not "evad[e] review." *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (*per curiam*); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979.